

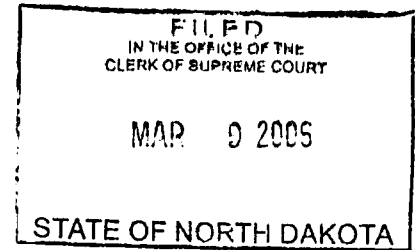
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20060065

North Dakota Supreme Court

Judiciary Standards Committee

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Honorable Douglas Mattson, Chair
District Court Judge
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March 8, 2006

Honorable Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard, Dept 180
Bismarck, ND 58505-0530

Re: Proposed Amendments to Terminology Section and Canon 5, Code of Judicial Conduct

Dear Chief Justice VandeWalle:

The Judiciary Standards Committee recently submitted to the Supreme Court proposed amendments to the Code of Judicial Conduct in response to the U.S. District Court's decision in *North Dakota Family Alliance v. Bader*, 361 F. Supp.2d 1021 (D.N.D. 2005). The proposed amendments, with modifications, were adopted. In my letter submitting the proposed amendments, I explained that the Committee would continue to review the 8th Circuit Court of Appeals' August 2005 opinion on remand from the U.S. Supreme Court. In that opinion, *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005), the Court of Appeals held unconstitutional provisions of the Minnesota Code of Judicial Conduct limiting partisan political activity and solicitation activity by candidates for judicial office. The Committee has completed its review of the opinion and its potential impact on North Dakota ethical canons and proposes further amendments to the Code of Judicial Conduct.

The Committee initially awaited word regarding U.S. Supreme Court action concerning the petition for writ of certiorari filed with respect to the 8th Circuit Court of Appeals opinion. The Supreme Court's denial of the petition and the impending election cycle underscored the Committee's need to proceed expeditiously with its review.

Briefly stated, the 8th Circuit Court of Appeals declared unconstitutional those provisions within the Minnesota Code of Judicial Conduct which prohibited a candidate from attending political gatherings and seeking, accepting, or using endorsements from political organizations. The North Dakota versions of these provisions are found in Canon 5A(1)(d) [prohibition against seeking or accepting an endorsement or letter of support from a political party] and Canon 5A(1)(f) [prohibition against purchasing tickets for and attending political gatherings]. The 8th Circuit Court of Appeals also reviewed "portions of the solicitation clause" - Minnesota Canon 5B(2). The North Dakota counterpart is Canon 5C(2). Both provisions prohibit a candidate from personally soliciting or accepting campaign contributions or publicly stated support. The Court concluded Minnesota's general prohibition against such activities was unconstitutional but emphasized that its opinion considered only the issues presented by the appellants: "Appellants challenge only the fact that they cannot solicit contributions from large groups and cannot, through their campaign committees, transmit solicitation messages above their personal signatures." *White* at 764, 765.

The task of analyzing the 8th Circuit's opinion and assessing any additional pertinent information was assigned to a Subcommittee, which was chaired by Judge Steven McCullough. Other Subcommittee members were Lisa McEvers, Joel Fremstad, and John Mahoney.

The Subcommittee reviewed the opinion, portions of the Final Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, and law review articles assessing the impact of the opinion. After review of the 8th Circuit opinion and related material, the Subcommittee concluded a significant constitutional failing of the Minnesota restrictions on "partisan activities" was their underinclusiveness. The Court emphasized that the proffered compelling state interest in judicial impartiality or "open-mindedness" could not withstand strict scrutiny analysis because the Minnesota restrictions on partisan activities such as attending political gatherings or seeking and accepting political organization endorsements applied only to "association[s] of individuals under whose name a candidate files for partisan office" - political parties." *White* at 759 (emphasis added). The fact that the Minnesota restrictions did not apply to involvement with numerous other organizations that may engage in political activities was fatal to the compelling state interest argument. To address this issue, the Subcommittee presented draft amendments to broaden the definition in the Terminology Section to encompass a broad range of organizations, in addition to political parties, that engage in some form of political activity. The draft amendments excepted from this definition organizations such as the North Dakota Judges Association, the State Bar Association, the North Dakota Judicial Conference, the American Bar Association.

The Subcommittee also presented draft amendments to Canon 5C(2) to address the infirmities found by the 8th Circuit Court of Appeals with respect to Minnesota's essentially similar solicitation clause.

The Judiciary Standards Committee reviewed the Subcommittee's draft amendments at its February 17 meeting. After discussion and modifications, the Committee finalized proposed amendments to the Terminology Section, and to Canons 5A and 5C of the Code of Judicial Conduct.

The Committee proposes amendments to the Terminology Section to expand the definition of "political organization" in an effort to address the potential issue of underinclusiveness. The term would be expanded to apply not only to political parties or other groups that support candidates for legislative or executive office, but also to any group that has as a principal purpose support or opposition to changes in constitutional, statutory, or regulatory provisions. An exception is provided for the North Dakota Judges Association, the North Dakota Judicial Conference, the State Bar Association, the American Bar Association, or any other entity that has as its principal purpose activity other than supporting candidates for political office or support or opposition to changes in constitutional, statutory, or regulatory provisions. Commentary is added which provides various factors to be considered in determining whether a particular group would be considered a "political organization.."

Consistent with the purpose of expanding the definition of "political organization", the Committee proposes amendments to Canon 5A(1) to reflect the extended reach of the definition. Proposed amendments to Canon 5A(1)(d) would prohibit seeking or accepting an endorsement or letter of support from a political organization, rather than the more limited political "party". Proposed amendments to Canon 5A(1)(f) would prohibit purchasing tickets for or attending gatherings or events sponsored by a political organization or candidate for legislative or executive office. It is important to note the Committee's conclusion that these restrictions are intended to support the state's compelling interest in maintaining judicial independence by preserving the separation between campaign activity for partisan political offices and campaign activity for non-partisan judicial offices. The proposed amendments contain an exception recognizing that Canon 5C(1)(a) permits a candidate to speak on the candidate's own behalf before a gathering sponsored by a political organization. This permissible activity is distinguishable from a candidate simply attending a political organization's event for purposes other than speaking on the candidate's own behalf, which would entail a greater level of involvement in purely political activity and would undermine the previously mentioned separation intended to serve the interest in judicial independence. The Committee also proposes adding several new paragraphs to the Commentary following Canon 5A(1) which illustrate and explain the compelling state interests served by the restrictions on political activity by candidates for judicial office.

The Committee proposes the deletion of paragraph [7] in the Commentary following Canon 5A(3). The paragraph was recently added by the Supreme Court and recognized that a petition for writ of certiorari had been filed with respect to the 8th Circuit Court of Appeals decision. The paragraph is no longer necessary as the petition was denied.

The Committee proposes amendments to Canon 5C(2), the "solicitation clause", to simply recognize the conclusion by the 8th Circuit Court of Appeals that candidates must be allowed to solicit contributions or publicly stated support from large groups or organizations and may include the candidate's signature or a reproduction of the signature on material, printed or electronic, distributed by a campaign committee which solicits contributions or publicly stated support. The proposed amendments, however, retain and make explicit the prohibition against directly and personally soliciting contributions or publicly stated support.

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Proposed changes to the following Commentary explain the interest in protecting against future allegations of bias or lack of impartiality that may result from direct and personal solicitation of individual contributors or supporters. These allegations are less likely to occur when solicitation occurs before a large group or organization, a circumstance in which individual contacts are arguably minimized. The changes to the Commentary also emphasize that while a candidate may solicit contributions or support from large groups or organizations, Canon 5A(1)(d) continues to prohibit a candidate from seeking or accepting an endorsement or letter of support from a political organization.

The Judiciary Standards Committee voted on February 17, 2006, to submit the proposed amendments to the Terminology Section and to Canons 5A and 5C to the Supreme Court for its consideration. I do not recall any opposition being voiced by anyone who attended the committee meeting. The Committee concluded that the amendments represent a measured response to the 8th Circuit Court of Appeals decision while retaining as much as realistically possible of current Code provisions.

If I can be of any assistance in the Supreme Court's review of the proposed amendments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, reading "Douglas L. Mattson". The signature is fluid and cursive, with the first name "Douglas" being the most prominent part.

Douglas L. Mattson, Chair
Judiciary Standards Committee

DLM/cs
Attachment
cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje

Proposed Amendments to Terminology Section to Modify Definition of "Political Organization" and Provide Commentary

TERMINOLOGY

• • • • •

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office for legislative or executive office or to support or oppose the continuation, amendment, repeal, enactment, initiative, or referendum of any constitutional, statutory, or regulatory provision. "Political organization" does not include the North Dakota Judges Association, the North Dakota Judicial Conference, the State Bar Association of North Dakota, the American Bar Association, or any association or entity composed of active or retired judges or attorneys whose principal purpose is other than to further the election or appointment of candidates for legislative or executive office or to support or oppose the continuation, amendment, repeal, enactment, initiative, or referendum of any constitutional, statutory, or regulatory provision. See Sections 5A(1), 5B(2) and 5C(1).

Commentary

Indicators of whether an organization has, as one of its principal purposes, any of the purposes listed above include whether, and the extent to which, the organization practices any of the following activities (which are listed by way of example and not by way of limitation): 1) lobbying, retaining lobbyists or registering as lobbyists for any legislative body; 2) nominating or endorsing any candidates for legislative or executive office; 3) drafting or circulating any petitions for action to be taken in regard to any constitutional, statutory, or regulatory provision; 4) publicly advocating, through the use of print, electronic, or other mass media, in support of or opposition to the election or appointment of candidates for legislative or executive offices, or for or against the continuation, amendment, repeal, enactment, initiative, or referendum of any constitutional, statutory, or regulatory provision; or 5) frequently being a party in, or appearing or requesting to appear as an amicus curiae in, litigation involving the validity or interpretation, or both, of constitutional, statutory, or regulatory provisions of the State of North Dakota or the United States of America.

• • • • •

1 **Proposed Amendments to Canon 5A(1), Commentary Following Canon 5A(3), and**
2 **Canon 5C(2)**

3 **CANON 5**

4 **A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN**
5 **FROM INAPPROPRIATE POLITICAL ACTIVITY**

6 **A. All Judges and Candidates.**

7 (1) Except as authorized in Sections 5B(2) and 5C(1), a judge or
8 candidate* for election or appointment to judicial office shall not:

9 (a) act as a leader or hold an office in a political organization*
10 or be a delegate to a political convention;

11 (b) publicly endorse or publicly oppose another candidate for
12 public office;

13 (c) make speeches on behalf of a political organization*;

14 (d) seek or accept an endorsement or letter of support from a
15 political ~~party~~ organization*;

16 (e) solicit funds for, pay an assessment to or make a contribution
17 to a political organization* or candidate; or

18 (f) except as provided by Section 5C(1)(a), purchase tickets for
19 and or attend political gatherings or other events sponsored by a political
20 organization* or a candidate for legislative or executive office.

21 **Commentary:**

22 [1] A judge or candidate for judicial office retains the right to participate in the
23 political process as a voter. However, the state has a compelling interest in maintaining the
24 independence, integrity, and impartiality of the judiciary, thus enhancing public confidence
25 in the justice system. In furtherance of this interest, judges and candidates for judicial office

1 must be kept free, and must appear to be free, from undue political influence and
2 inappropriate political pressure.

3 [2] The state's compelling interest in the independence of the judiciary is necessary
4 to ensure the rule of law instead of the rule of men and women (or factions thereof). Judicial
5 independence is intended to guarantee much more than impartiality toward litigants. It is
6 necessary for the judiciary to act as a check on the legislative and executive branches and to
7 protect the rights of the minority as those rights are enumerated in our Constitution. An
8 independent judiciary is one that is not dominated by or dependent upon the other two
9 branches of government, is not unduly entangled in the political machinery of the other two
10 branches, and is not actuated in its decision-making by the same political policy
11 considerations and interests as the other branches. Instead, the judiciary should be centered
12 on legal rather than political policy considerations. The importance of the independence of
13 the judiciary, and the separation of powers, is recognized by several provisions of the North
14 Dakota Constitution, specifically that the legislative power is vested in the Senate and House
15 of Representatives, N.D. Const.art.III, §1; that the executive power is vested in the governor,
16 N.D. Const. art.V, §1; that the judicial power is vested in the unified court system headed by
17 the supreme court, N.D. Const. art. VI, §1; that the legislative, executive, and judicial
18 branches are co-equal branches of government, N.D. Const. art. XI, §26; that a member of
19 the judiciary may not hold a non-judicial office nor shall any duties be imposed upon him or
20 her which are not judicial, N.D. Const. art. VI, §10; and that a judge's or justice's
21 compensation may not be diminished by the other branches during that judge's or justice's
22 term of office, N.D. Const. art. VI, §§7 and 9.

23 [3] Public confidence in the independence and impartiality of the judiciary is eroded
24 if judges or candidates for judicial office are perceived to be subject to political influence.
25 Accordingly, they are prohibited by Section 5A(1)(a) from assuming a leadership role in a
26 political organization*.

27 [4] Sections 5A(1)(b) and 5A(1)(c) prohibit judges and candidates for judicial office
28 from making speeches on behalf of political organizations* or publicly endorsing or
29 opposing candidates for public office, in order to prevent them from misusing the prestige
30 of judicial office to advance the interests of others. See, Canon 2B. These canons do not
31 prohibit candidates from campaigning on their own behalf or from endorsing or opposing
32 candidates for a position on the same court for which they are running.

33 [5] Members of the families of judges or candidates for judicial office are free to
34 engage in political activity of their own, including running for political office. The
35 prohibition in Section 5A(1)(b) against publicly endorsing candidates for public office,
36 however, does not include an exception for family members. Accordingly, a judge or

1 candidate for judicial office must not become involved in or publicly associated with a family
2 member's political activity or campaign for public office. To avoid public misunderstanding,
3 moreover, a judge or candidate for judicial office must take, and must require the family
4 member to take, reasonable steps to avoid any implication that the judge or candidate
5 endorses the family member's candidacy or other political activity.

6 [6] Section 5A(1)(c) does not prohibit judges or candidates for judicial office from
7 privately expressing their views on candidates for any public office.

8 [7] Sitting judges and candidates for judicial office retain the right to participate in the
9 political process as voters in both primary and general elections. For purposes of this Code,
10 participation in a caucus-type election procedure does not constitute public support for or
11 endorsement of a political organization* or candidate, and therefore is not prohibited by
12 Section 5A(1)(a) or 5A(1)(b).

13 [2] [8] Where false information concerning a judicial candidate is made public, a
14 judge or another judicial candidate having knowledge of the facts is not prohibited by Section
15 5A(1) from making the facts public.

16 [3] [9] Section 5A(1)(a) does not prohibit a candidate for elective judicial office from
17 retaining during candidacy a public office such as county prosecutor, which is not "an office
18 in a political organization."

19 [4] [10] Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately
20 expressing his or her views on judicial candidates or other candidates for public office.

21 [11] Section 5A(1)(d) prohibits a candidate for judicial office from filling out a
22 questionnaire if he or she knows, or has reason to know, that the purpose of the questionnaire
23 is for a political organization* to decide whom to endorse or provide a letter of support.

24 [5] [12] A candidate does not publicly endorse another candidate for public office by
25 having that candidate's name on the same ticket.

26 (2) A judge shall resign from judicial office upon becoming a
27 candidate* for a non-judicial office either in a primary or in a general election,
28 except that the judge may continue to hold judicial office while being a candidate
29 for election to or serving as a delegate in a state constitutional convention.

30 (3) A candidate* for a judicial office:

1 (a) shall maintain the dignity appropriate to judicial office and
2 act in a manner consistent with the impartiality*, integrity , and
3 independence of the judiciary, and shall encourage members of the
4 candidate's family* to adhere to the same standards of political conduct
5 in support of the candidate as apply to the candidate;

6 Commentary:

7 [1] Although a judicial candidate must encourage members of his or her family to
8 adhere to the same standards of political conduct in support of the candidate that apply to the
9 candidate, family members are free to participate in any other political activity.

10 (b) shall prohibit officials who serve at the pleasure of the
11 candidate,* and shall discourage employees and other officials subject to
12 the candidate's direction and control from doing on the candidate's behalf
13 what the candidate is prohibited from doing under this Canon;

14 (c) except to the extent permitted by Section 5C(2), shall not
15 authorize or knowingly* permit any other person to do for the candidate*
16 what the candidate is prohibited from doing under this Canon;

17 (d) shall not:

18 (i) with respect to cases, controversies, or issues that are
19 likely to come before the court, make pledges, promises or
20 commitments that are inconsistent with the impartial*
21 performance of the adjudicative duties of the office; or

22 (ii) knowingly* misrepresent the identity, qualifications,
23 present position or other fact concerning the candidate or an
24 opponent;
25

26 (e) may respond to personal attacks or attacks on the
27 candidate's record as long as the response does not violate Section
28 5A(3)(d).

29 Commentary:

1 [1] Section 5A(3)(d) prohibits a candidate for judicial office from making statements
2 that commit the candidate regarding cases, controversies or issues likely to come before the
3 court. As a corollary, a candidate should emphasize in any public statement the candidate's
4 duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the
5 general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate
6 from making pledges or promises respecting improvements in court administration. Nor does
7 this Section prohibit an incumbent judge from making private statements to other judges or
8 court personnel in the performance of judicial duties. This Section applies to any statement
9 made in the process of securing judicial office, such as statements to commissions charged
10 with judicial selection and tenure and legislative bodies confirming appointment. See also
11 Rule 8.2 of the North Dakota Rules of Professional Conduct.

12 [2] The compelling interests of the state supporting the restrictions imposed under
13 Section 5A(3)(d) are recognized and supported by several provisions of the North Dakota
14 Constitution, specifically with respect to ensuring the citizens of this state due process of law,
15 N.D. Const. art. I, §§ 9 and 12; equal protection of the law, N.D. Const. art. I, § 21; open
16 courts, N.D. Const. art. I, § 9; and justice without sale, denial, or delay, N.D. Const. art. I,
17 § 9. Further, because of circumstances found in this state, it is necessary to protect those
18 interests by placing the least restrictive limits on the free speech of candidates* and judges
19 possible. North Dakota is a geographically large state with a largely rural, sparse population
20 and a small number of appellate judges and general jurisdiction trial judges. North Dakota
21 also has a very liberal statute providing for a change of judge upon demand, N.D. Cent.
22 Code § 29-15-21. Within a relative short period of time, each of these judges will have been
23 subject to election. Without Section 5A(3)(d), it is reasonably foreseeable that on a particular
24 issue every judge in the state could have pledged, promised, or made a commitment that may
25 be considered inconsistent with the impartial* performance of the judge's adjudicative duties.
26 The limitations imposed under Section 5A(3)(d) are necessary as disqualification under
27 Canon 3E alone may not sufficiently protect the interests described in this comment. See
28 also the limitations imposed under Canon 3B(10).

29 [3] The state also has a compelling interest in maintaining the integrity, independence,
30 and impartiality of the judiciary, thus enhancing public confidence in the justice system. In
31 furtherance of this interest, judges and candidates for judicial office should be free from
32 political influence, taking into account the methods of selecting judges and the constitutional
33 provisions governing free speech and expressive association. In order to advance the state's
34 compelling interests, Canon 5A imposes restrictions on the political and campaign activities
35 of all sitting judges and all candidates for judicial office. In all events, a candidate for
36 judicial office should maintain the dignity appropriate to judicial office.

1 [4] A judge's obligation to avoid prejudgment is well established. Under the First
2 Amendment and in light of the voters' right to have information about an elective candidate's
3 views, judicial ethics provisions may not prohibit judicial candidates from announcing their
4 views on disputed legal and political questions. Canon 5A(3)(d), which applies the
5 prohibitions of Canon 3B(10) to all candidates for judicial office, does not proscribe a
6 candidate's public expression of personal views on disputed issues. To ensure that voters
7 understand a judge's duty to uphold the Constitution and laws of this state where the law
8 differs from the candidate's personal belief, however, candidates are encouraged to
9 emphasize their duty to uphold the law regardless of their personal views.

10 [5] Some speech restrictions are indispensable to maintaining the integrity,
11 impartiality, and independence of the judiciary. The state has a compelling interest in
12 enforcing these restrictions. Thus, under this Canon it remains improper for a judicial
13 candidate to make pledges, promises, or commitments regarding specific classes of cases,
14 specific litigants or classes of litigants, or specific propositions of law that would reasonably
15 lead to the conclusion that the candidate has prejudged a decision or ruling in cases that
16 would fall within the scope of the pledge, promise, or commitment. To fall within the
17 proscription of this Canon the statement by the candidate must pertain to matters likely to
18 come before the court on which the candidate would serve, if elected. Statements by a
19 candidate that would have this effect are inconsistent with the obligation of all judges to
20 perform impartially the adjudicative duties of the office.

21 [6] Candidates for judicial office often receive questionnaires or requests for
22 interviews from the media and from issue advocacy or other community organizations
23 seeking to learn the candidates' views on disputed or controversial legal or political issues.
24 Section 5A(3)(d) does not generally prohibit candidates from responding to this kind of
25 inquiry, but candidates should proceed with caution if they choose to respond. Depending
26 on the wording of the questions and the format provided for answering, a candidate's
27 response might constitute pledges, promises, or commitments to perform the adjudicative
28 duties of the office other than in an impartial way. In order to avoid violating Section
29 5A(3)(d), therefore, candidates who choose to respond should make clear their commitment
30 to keeping an open mind while on the bench, regardless of their own personal views.

31 ~~[7] The U.S. Court of Appeals for the 8th Circuit, in Republican Party of Minnesota~~
32 ~~v. White, 416 F.3d 738 (8th Cir. 2005), found unconstitutional certain similar Canon 5~~
33 ~~provisions in the Minnesota Code of Judicial Conduct. Petition for certiorari is pending~~
34 ~~before the U.S. Supreme Court.~~

1 **B. Candidates Seeking Appointment to Judicial or Other Governmental**
2 **Office.**

3 (1) A candidate* for appointment to judicial office or a judge seeking
4 non-judicial governmental office shall not solicit or accept funds, personally or
5 through a committee or otherwise, to support his or her candidacy.

6 (2) A candidate* for appointment to judicial office or a judge seeking
7 non-judicial governmental office shall not engage in any political activity to
8 secure the appointment except that such persons may:

9 (a) communicate with the appointing authority, including
10 any selection or nominating commission or other agency designated
11 to screen candidates;

12 (b) seek support or endorsement for the appointment
13 from organizations that regularly make recommendations for
14 reappointment or appointment to the office, and from individuals
15 to the extent requested or required by those specified in Section
16 5B(2)(a); and

17 (c) provide to those specified in Sections 5B(2)(a) and
18 5B(2)(b) information as to the person's qualifications for the office.

19 (d) contact lawyers and others for expressions of support to
20 be submitted to the appointing authority identified in Section
21 5B(2)(a) and may distribute personal and professional information
22 in the form of resumes that describe the person's qualifications for
23 office.

24 **Commentary:**

25 [1] Section 5B(2) provides a limited exception to the restrictions imposed by Sections
26 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial
27 office or appointment to another judicial office or other governmental office may apply for
28 the appointment and seek appropriate support.

29 **C. Judges and Candidates Subject to Public Election.**

1 (1) A judge or a candidate* subject to public election* may, except as
2 prohibited by law*:

3 (a) at any time, publicly speak on behalf of his or her own
4 candidacy or on behalf of measures to improve the law, the legal system,
5 or the administration of justice, whether or not at a gathering sponsored
6 by a political organization;

7 (b) when a candidate for election

8 (i) appear in newspaper, television and other media
9 advertisements supporting his or her candidacy;

10 (ii) distribute pamphlets and other promotional campaign
11 literature supporting his or her candidacy; or

12 (iii) publicly endorse or publicly oppose other candidates
13 for the same judicial office in a public election in which the judge
14 or judicial candidate is running.

15 (2) A candidate* shall not directly and personally solicit or accept
16 campaign contributions ~~or directly and personally solicit~~ publicly stated support.
17 A candidate may, ~~however,~~ establish committees of responsible persons to
18 conduct campaigns for the candidate through media advertisements, brochures,
19 mailings, candidate forums and other means not prohibited by law. Such
20 committees may solicit and accept reasonable campaign contributions, manage
21 the expenditure of funds for the candidate's campaign and obtain public
22 statements of support for his or her candidacy. While a candidate may not
23 directly and personally solicit contributions or public statements of support, the
24 candidate may solicit contributions or publicly stated support in front of large
25 groups or organizations. The candidate's actual signature or a reproduction of
26 the signature may appear on letters or other printed or electronic materials
27 distributed by the committee which solicit contributions or publicly stated
28 support from individuals or large groups. Such Campaign committees are not
29 prohibited from soliciting and accepting reasonable campaign contributions and
30 public support from lawyers. A candidate's committees may solicit contributions
31 and public support for the candidate's campaign no earlier than one year before
32 an election and no later than 90 days after the last election in which the
33 candidate participates during the election year. A candidate shall not use or

1 permit the use of campaign contributions for the private benefit of the candidate
2 or others.

3 Commentary:

4 [1] Section 5C(2) seeks to insulate candidates for judicial office from personal
5 contacts with contributors or public supporters that may lead to allegations of bias or lack of
6 impartiality if the contributor or supporter should later appear before the judge. As a result,
7 candidates are prohibited from directly and personally soliciting contributions or publicly
8 stated support. This limitation is intended to minimize the occurrence of direct personal
9 contacts with individual contributors or public supporters. However, because the activity is
10 more removed and less likely to result in specific knowledge about any individual
11 contributions or expressions of public support, a candidate is permitted to affix the
12 candidate's signature, or a reproduction of the signature, to printed or electronic material
13 soliciting contributions or support. While Section 5C(2) allows a candidate to solicit
14 contributions or publicly stated support from large groups or organizations under certain
15 circumstances, Section 5A(1)(d) continues to prohibit a candidate from seeking or accepting
16 an endorsement or letter of support from a political organization. Section 5C(2) permits a
17 candidate, other than a candidate for appointment, to establish campaign committees to
18 solicit and accept public support and reasonable financial contributions. At the start of the
19 campaign, the candidate must instruct his or her campaign committees to solicit or accept
20 only contributions that are reasonable under the circumstances. Though not prohibited,
21 campaign contributions of which a judge has knowledge, made by lawyers or others who
22 appear before the judge, may be relevant to disqualification under Section 3E.

23 [2] Campaign committees established under Section 5C(2) should manage campaign
24 finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to
25 the extent possible.

26 [3] Section 5C(2) does not prohibit a candidate from initiating an evaluation by a
27 judicial selection commission or bar association, or, subject to the requirements of this Code,
28 from responding to a request for information from any organization.

29 **D. Incumbent Judges. A judge shall not engage in any political activity**
30 **except (i) as authorized under any other Section of this Code, (ii) on behalf of measures**
31 **to improve the law,* the legal system or the administration of justice, or (iii) as**
32 **expressly authorized by law.**

33 Commentary:

1 [1] Neither Section 5D nor any other section of the Code prohibits a judge in the
2 exercise of administrative functions from engaging in planning and other official activities
3 with members of the executive and legislative branches of government. With respect to a
4 judge's activity on behalf of measures to improve the law, the legal system and the
5 administration of justice, see Commentary to Section 4B and Section 4C(1) and its
6 Commentary.

7 **E. Applicability. Canon 5 generally applies to all incumbent judges and**
8 **judicial candidates*. A successful candidate, whether or not an incumbent, is subject**
9 **to judicial discipline for the candidate's campaign conduct; an unsuccessful candidate**
10 **who is a lawyer is subject to lawyer discipline for the candidate's campaign conduct.**
11 **A lawyer who is a candidate for judicial office is subject to Rule 8.2(b) of the North**
12 **Dakota Rules of Professional Conduct.**

13 *See Terminology, "impartiality" or "impartial"

14 *See Terminology, "law."

15 *See Terminology, "candidate."

16 *See Terminology, "political organization."

17 *See Terminology, "member of the candidate's family."

18 *See Terminology, "knowingly."

19 *See Terminology, "public election."